No. 142

United States Court of Appeals

October Term, 1968

JAMES ROBERT GROGAN, III, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. The Solicitor General's brief for the United States in opposition to the grant of a Writ of Certiorari demonstrates the impossibility of finding any basis for a proper exercise of discretion by this trial judge in declaring a mistrial. In a seven-page brief, the Solicitor General devotes three and one-half pages to a statement of facts, most of which is taken from a transcript of the Petitioner's *second* trial, and relevant only to the question of Petitioner's guilt

or innocence. Even after this particularization of the record, the Solicitor General is reduced to the assertion that the declaration of a mistrial by the trial judge was justified "in all the circumstances."

If "all the circumstances" in this case are a sufficient basis upon which the discretion to declare a mistrial can be exercised, we can imagine no circumstances in which that discretion could be abused. If the argument of the Solicitor General is accepted and the decision of the court below affirmed, judicial discretion becomes not "a sound discretion used with the greatest caution" but an arbitrary and potentially capricious weapon of judicial power. Its potential is demonstrated by the record guilty pleas obtained after mistrial declared by this trial judge (Pet. 13-14).

A Petition and a Brief in Opposition are improper occasions for detailed consideration of the merits of Petitioner's plea. But, because the brief for the United States relies entirely upon these circumstances, it is necessary to reiterate them briefly. The only extant facts upon which the trial judge could have based his discretion were (1) the length of time the jury had been out and (2) the jury's acquittal of Packard. As to the former, the Solicitor General seeks to reduce a complicated trial to a simple issue of "whether petitioner knew that the aircraft parts he had purchased were stolen." In a similar vein, the only issue in a first degree murder trial is whether the defendant killed the victim with malice aforethought. In the light of the number of defendants, the length of the trial, and the number of witnesses and exhibits bearing only circumstantially upon this complex issue, deliberations of only three and one-half hours cannot serve as a factual base for a trial judge's *otherwise unsupported* conclusion. Similarly, whether the trial judge feared that the jury, having exonerated Packard, would then probably acquit Grogan, or whether he assumed with

no support in fact that the jury could not agree, the mistrial at that point was improper. If any inference is proper, it is that, given time, the jury would have acquitted petitioner, too.

The Solicitor General interjects counsel's objection to the supplemental charge as a fact upon which the trial judge could have relied. First, it does not bear upon the jury's ability to agree. More important, if the Solicitor General is correct, counsel could object to a trial judge's charge only at the price of sacrificing a defendant's valued right not to be twice placed in jeopardy. The United States cannot so burden the exercise of a Constitutional right. *Griffin v. California,* 380 U.S. 609 (1965).

2. The Solicitor General argues, in a footnote, that it is unnecessary to deal with the first question presented by the Petitioner as to whether an accused can by silence waive his Constitutional protection against being twice placed in jeopardy. The Solicitor General's position is that, if the mistrial were properly granted, this serious Constitutional question need not be considered by the Court in this case. Thus, the Solicitor General, just as did the Fifth Circuit below, the Eighth Circuit in *Ferina v. United States,* 340 F.2d 837 (1965) and the Sixth Circuit in *Barker v. Ohio,* 328 F.2d 582 (1964), avoids the Constitutional question by dealing with the merits. The court should take this opportunity to put an end to this approach which, in effect, preordains a decision adverse to the petitioner.

The waiver question is properly and appropriately presented here and should not be avoided. The unequal treatment of defendants, depending on whether they are tried in a Circuit which does or does not condone waiver by silence, should be ended. When the merits of petitioner's claim to this Constitutional guarantee are considered, that considera-

tion should be made in a context free of confusion concerning waiver by silence.

Respectfully submitted,
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